Office - Supreme Court, U.S.
FILED
JUN 23 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-2136

IN THE

Supreme Court of the United States

October Term, 1981

TEXACO INC.,
Petitioner,

v.

RICKY HASBROUCK, d/b/a Rick's Texaco, et. al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF FACTS

This antitrust case was brought by plaintiffs-respondents under the Robinson-Patman Act, 15 U.S.C. § 13. The plaintiffs, operators of Texaco retail gasoline stations in Spokane, Washington, alleged that Texaco unlawfully discriminated in price against them by selling identical gasoline at substantially lower prices to other customers who operated chains of retail gasoline stations which competed with plaintiffs. The plaintiffs alleged that they were injured in their businesses and properties by reason of the discrimination.

A jury found that Texaco had violated the Robinson-Patman Act for more than 7 years. The jury also concluded — despite vigorous arguments by Texaco to the contrary — that the violation had caused injury to the plaintiffs, and returned a verdict for plaintiffs equivalent to an average of $10,891 per year for each plaintiff. The district court held that the evidence was sufficient to support the jury's finding of a violation of the Act.[1]

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1. The district court held that

> [T]here is sufficient evidence to support the plaintiffs' case and preclude the court from interfering with the jury's determination based on the instructions provided the jury.

The district court instructed the jury based upon *Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970). That opinion held that, absent extraordinary circumstances, unlawful price discrimination constitutes business injury under the antitrust laws, entitling the plaintiff to recover at least the amount of the discrimination. On several occasions both before and during the trial, Texaco had argued to the district court that the *Fowler* rule was not applicable to the facts of this case or, if applicable, that *Fowler* was no longer valid law. On each occasion, the district court rejected Texaco's argument, holding that *Fowler* was valid and applicable. Indeed, the district court instructed the jury that the *Fowler* rule "is the appropriate way in which damages should be measured in this case." Tr 4285.

Seven months following the verdict, however, the district court changed its mind. Although expressly finding that plaintiffs had introduced sufficient evidence to prove a violation of the Robinson-Patman Act, in a Memorandum Decision the district court for the first time held that *Fowler* did not apply, or if it applied, that it was no longer valid law. The court thus concluded that the jury instructions which the court had given based on *Fowler* were erroneous.

The district court did not order a new trial on proper instructions, but instead entered judgment n.o.v. for Texaco. Plaintiffs appealed from the judgment n.o.v. to the Ninth Circuit Court of Appeals.

During the tendency of the appeal, this Court decided the case of *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981). In *Payne*, this Court resolved a split among the circuits, and held that proof of price discrimination was not, in and of itself, sufficient proof of injury to support a

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Footnote 1 (con't)

App. 52a. The citation "App. _____" refers to the Appendix in the Petition for Writ of Certiorari, and the citation "R. App. _____" refers to the Appendix to this brief. Trial transcript passages are cited as "Tr. ____," and trial exhibits are cited as "Ex. _____"

verdict under Section 4 of the Clayton Act, 15 U.S.C. § 15. Texaco argued in the court of appeals that *Payne* was dispositive of the appeal. Plaintiffs argued that *Payne* was not dispositive; that this case is significantly different from *Payne*; that when this case was tried the *Fowler* rule had been specifically approved by the Ninth Circuit and by other circuits as well, and had been justifiably relied upon by the plaintiffs and the district court in instructing the jury on the appropriate measure of damages; and that if the adequacy of the damages evidence was now subject to question in view of the *Payne* decision, the Court of Appeals should remand for a new trial. The court of appeals, in a unanimous opinion, reversed the judgment n.o.v. for Texaco and remanded for a new trial.

Implicit in Texaco's argument here and in the court of appeals, and implicit in the district court's decision, is the notion that plaintiffs' evidence was insufficient to establish injury as required by the antitrust laws and that judgment for Texaco was therefore appropriate. The district court even went so far as to declare (incorrectly) that plaintiffs had acknowledged that they could not prove injury absent resort to the *Fowler* rule. In fact, plaintiffs made a strong showing of fact of injury and causal link to the violation.

Indeed, early in the trial Texaco *objected* to plaintiffs' presenting evidence to prove fact of damage, arguing that if plaintiffs were going to rely on *Fowler* they should not be allowed to present any evidence of the fact of damage other than evidence of the price discrimination. In response, plaintiffs' counsel explained that plaintiffs were not simply relying on *Fowler* to prove fact of damage:

> Your Honor, we are required in this case — I should not say required; Ms. Cohen [counsel for Texaco] may be right, we may not be required. However, *we are proving the fact of damage which is an entirely different item of proof than the amount.* By proving the fact of damage, we show that the rule adopted by the Ninth Circuit also has a basis in fact . . . but *we are entitled to prove the fact of damage in the manner in which we have*, and our claim under the measure of damages is actually the minimum amount possible that could be requested.

> Assuming that on every gallon of gas they brought they were charged an unlawful price, the consequences of that are much greater than just the one gallon of gas they brought. Perhaps it affects the rest of their business because they have to work harder to pay for it. The minimum amount they have lost was the amount that they were overcharged.
>
> *We are now proving to the jury that there was actual damage. . . . [W]e are entitled to prove the fact of damage.*

(Tr. 708-709, emphasis added.) Other comments showed the same thing.[2]

There was substantial and dramatic evidence of injury to the plaintiffs caused by the price discrimination. The evidence showed that the price discrimination was substantial in size, and that it occurred over a long period of time in a market characterized by vigorous competition and low profit margins. The evidence also clearly showed that the favored buyers used their lower wholesale prices to reduce the retail prices at which they sold gasoline to the public, and that the favored buyers' retail prices often were barely above the plaintiffs' wholesale buying price. There was

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2. In the course of the same argument the following exchange occurred between the district court and plaintiffs' counsel:

> THE COURT: Well *as I understand it, the only purpose for this is to show that there has been some damage and not for showing the measure of damage*?
>
> MR. WHALEY: *That's correct.*
>
> THE COURT: *Any damages for that basis you would agree should not be allowed by the Court or by the jury, but only measure damages that you have claimed. Your only showing is to show there have been some damages?*
>
> MR. WHALEY: *Your Honor, we're going to ask the jury to measure the damages that have been inflicted by the use of the Fowler v. Gorlick Construction* . . . we can tell the jury we don't want any more than that. If they want more than that, it would be speculative. But in considering that the award to damages [sic] they consider the fact they have been damaged.

(Tr. 713, emphasis added.)

> THE COURT: That's what I'm getting at. *You are getting into that [evidence of injury to plaintiffs' businesses] to show that there has been damage, but you are not contending and do not intend to*

substantial testimony that plaintiff lost customers to the favored buyers' stations, or were seen in other stations, and testimony that credit card slips from the favored buyers' stations were observed in customers' automobiles. The evidence also showed that the sales of Dompier and Gull (the favored buyers) increased dramatically, while the sales volume of independent Texaco retailers such as plaintiffs, who were not receiving a price discount, declined; that Dompier's share of total Texaco brand sales rose significantly while the share of other Texaco retailers declined; that Dompier and Gull were able consistently to increase the number of their stations while the number of independent Texaco stations (including the plaintiffs' stations) declined; that numerous witnesses familiar with the market, including Dompier's president and Texaco's assistant district manager, had observed that a competitor with a lower buying price necessarily had a competitive advantage; that small price differences caused substantial volume shifts; that Texaco's own personnel admitted that a distributor who operates as a retailer is not performing the traditional role of a distributor; that retailers paying the same price as plaintiffs had, in Texaco's own words, a "very real problem in competing against distributors who turned to retailing, using their lower price for that purpose; that Texaco realized this situation had caused "rampant and alarming" increases in distributor sales, a great portion of which was at the expense of independent retailers; that, in the words of Texaco's own sales vice president, the distributor price discount was the "root cause" of the decline in independent retailers' sales volumes; that Texaco's Spokane sales representative concluded that the plaintiffs "cannot compete" with

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Footnote 2 (con't)

> *contend that the jury is entitled to calculate damages based on that information, other than the minimum of what you call the minimum damage?*
>
> MR. WHALEY: *That's correct.*

(Tr. 715, emphasis added.)

Dompier; that Texaco's Spokane management termed Texaco's dual pricing system a "two headed snake;" that plaintiffs constantly complained to Texaco about lower prices received by customers of Dompier when Dompier did resell at wholesale rather than retail; and that Texaco personnel knew that Dompier was passing on a substantial part of his wholesale discount.[3]

Despite this evidence of injury and causation, the district court weighed the evidence of fact of damage and causation, and accepted Texaco's arguments that injury "may have been" caused by other factors (App. 29a); that there is a "real possibility" that other factors caused injury to plaintiffs (*Id.*); that other factors "might have" caused plaintiffs' injury (App. 46a, 47a); and that other factors "could have" affected plaintiffs adversely (App. 47a, 50a). The district court even went so far as to suggest that plaintiffs had admitted that they could not and did not prove any actual injury. (App. 40a.)

The court of appeals, however, examined the record and concluded that "[t]he record does not support the contention that appellants admitted inability to prove damages under any rule but *Fowler*." (App. 4a.) The court of appeals further held that this case was not distinguishable from *Fowler*, and that *Fowler* had not necessarily been overruled *sub silentio* by this Court's ruling in *Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477 (1977). (*Id.*) The court of appeals held that if *Fowler* was valid and not properly distinguishable at the time of ruling on the Texaco motion for judgment n.o.v., it should have been applied, and that judgment n.o.v. for Texaco was inappropriate. The court of appeals thus remanded the case for a new trial, a resolution which, it noted, paralleled the solution adopted by the Seventh Circuit in another post-*Payne* case, *Vanco Beverages, Inc. v. Falls City City Indus., Inc.*, 654 F.2d 1224 (7th Cir. 1981). (App. 4a-5a.)

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3. Excerpts from the plaintiffs' brief in the court of appeals, setting forth these and other facts, are contained in the Appendix hereto.

SUMMARY OF ARGUMENT

By its petition, Texaco seeks review by this Court of an issue which was only very recently addressed in *Payne*. Texaco points to no decision of this Court with which the decision of the court of appeals is in conflict. The issues raised by Texaco's petition simply go to the appropriateness of the Ninth Circuit's disposition of the case following argument. The Ninth Circuit's disposition of the appeal was identical to that followed by the Seventh Circuit in *Vanco Beverages*.

This case presents different, and much stronger facts than those before the Court in *Payne*. Here there was strong evidence of a violation of the Robinson-Patman Act, and substantial evidence of injury caused by the antitrust violation. Neither was present in *Payne*. The court of appeals correctly held that the district court should have ordered a new trial, rather than judgment n.o.v. for Texaco, based on its post-trial conclusion that it had erred in instructing the jury under *Fowler*.

ARGUMENT

The Evidence of Fact of Damage and Causation Was Sufficient to Support the Verdict.

The price discrimination here was of long standing duration, occurred in a competitive market, and influenced retail prices. There was evidence that the favored purchasers prospered while the disfavored purchasers did not, and that Texaco's own executives acknowledged the advantage which the price discounts offered and the adverse effects on the disfavored purchasers. These are circumstances which establish injury and permit the recovery of damages.[4]

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4. Only ten years before the trial of this case, this Court had indicated the sufficiency of such evidence. In *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), the Court said:

> If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury. [Citations omitted.] Here . . . there was substantial evidence from which the jury could infer causation. There was evidence that Signal received a lower price from Standard than did

A violation of the antitrust laws need not be the only cause of injury. It is sufficient that it was a material contributing factor:

> It is enough that the illegality is shown to be a material cause of the injuries; a plaintiff need not exhaust all possible sources of injury in fulfilling his burden of proving compencible injury under § 4 [of the Clayton Act]

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9 (1969). Contrary to this fundamental rule, Texaco argued in the court of appeals that plaintiffs were required to introduce evidence to rebut the possibility that factors other than Texaco's violation caused injury to the plaintiffs. The district court adopted a similar theory in granting judgment for Texaco. In so holding, the district court improperly weighed the evidence, a practice which is not appropriate in ruling on a motion for judgment notwithstanding the verdict. Rule 50(b), Fed. R. Civ. P. The district court simply accepted Texaco's arguments — rejected by the jury — that the plaintiffs' injury "might have been" caused by other factors. But what "might have been found" plainly is not the standard on a motion for a judgment notwithstanding the verdict. *United California Bank v. THC Financial Corp.*, 557 F.2d 1351, 1356 (9th Cir. 1977). Texaco argued what "might have been" to the jury at length, and the district court gave the jury instructions which directly tracked Texaco's arguments, and which virtually invited the jury to conclude that injury resulted from factors other than Texaco's long-standing price discrimination. (Tr. 4272.) The jury rejected those arguments. What the jury "might have" or "could have" concluded is not sufficient to

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Footnote 4 (con't)

> Perkins, that this price advantage was passed on, at least in part, to Regal, and that Regal was thereby able to undercut Perkins' price on gasoline. Furthermore, there was evidence that Perkins repeatedly complained to standard officials that the discriminatory price advantage given Signal was being passed down to Regal and evidence that Standard officials were aware that Perkins' business was in danger of being destroyed by Standard's discriminatory practices. *This evidence is sufficient to sustain the jury's award of damages under the Robinson-Patman Act.*

395 U.S. at 648-49 (emphasis added). All these elements outlined by the Supreme Court in *Perkins* were present here.

reason to reason to overturn their verdict. The standard is far stricter than that. "If there is sufficient evidence in the record to support an influence of causation, the ultimate conclusion as to what the evidence proves is for the jury." *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969). The district court improperly interfered with the jury's function.

Here there was substantial evidence of proof of injury, sufficient to support the verdict. Further, the court of appeals found that "the record does not support the contention that [plaintiffs] admitted an inability to prove damages under any rule but Fowler." The fundamental premise of the district court's memorandum decision, and Texaco's argument here, is wrong.

The Court of Appeals Properly Ordered a New Trial

Texaco argues that it was obvious that *Fowler* was no longer good law after this Court decided *Brunswick*. Yet the record discloses, and the court of appeals concluded, exactly the opposite.

Texaco argued the *Brunswick* theory to the district court several times before and during the trial. *On each occasion*, the district court concluded, contrary to Texaco's "obvious" argument, that *Fowler* was valid law which had to be followed. Plaintiffs relied upon these rulings of the district court and upon *Fowler* in presenting their damages evidence at trial. It was not until seven months *after* the verdict that the district court changed its mind and, for the first time, held that *Fowler* was no longer valid.

The Ninth Circuit correctly concluded that *Brunswick* did not necessarily overrule *Fowler sub silentio*. *Brunswick* involved damages claimed to have resulted from the presence of *additional* competition in the market — plainly not the kind of injury for which the antitrust laws intended a remedy. This case, on the other hand, involves exactly the kind of secondary-line price discrimination at which the Robinson-Patman Act was aimed. The *Brunswick* opinion nowhere mentions the Robinson-Patman Act, and does not indicate that the *Fowler* rule was jeopardized. Indeed, the Ninth

circuit's rule — a rule adopted by other circuits as well — was based upon an express statement of this Court that a private plaintiff could sue under the Robinson-Patman Act and recover three times the amount of the discrimination "without proving more than the illegality of the prices." In *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947), this Court said that:

> We have assumed for the purposes of this case that petitioner could establish that the prices respondent charged were discriminatory so that they violated the Act. But if petitioner can show that, clearly it would be entitled to recover in a triple damage suit supported by the same evidence. *For despite petitioners' plaint on the difficulty of proving damages, it would establish its right to recover three times the discriminatory difference without proving more than the illegality of the prices. If the prices are illegally discriminatory, petitioner has been damaged in the absence of extraordinary circumstances, at least in the amount of that discrimination.*

330 U.S. 757 (emphasis added). *Brunswick* nowhere mentioned or even indicated that this prior statement of the Court was in jeopardy.

Given this record, plaintiffs and the district court were justified, as the Ninth Circuit held, in relying upon *Fowler* as valid law at the time the case was tried. Except where a prior decision is "papably erroneous", the principle of stare decisis should be adhered to in order to give stability and predictability to the law, *Pachmeyer Gun Works, Inc. v. Olin Matheson Chem. Corp.*, 502 F.2d 802, 805-06 (9th Cir. 1974), even if the earlier decision represents a minority rule which has been strongly criticized. *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 814 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977). The court of appeals correctly held that district courts are bound by the law of their own circuit and are not to resolve splits between circuits no matter how egregiously in error they feel their own circuit to be, and may not grant

judgments n.o.v. based upon their dissatisfaction with the law of their circuit.[5]

The thrust of Texaco's argument is that it was entitled to a judgment in its favor notwithstanding the verdict because of an error in jury instructions. But the appropriate remedy — adopted by the court of appeals — in such a situation is to order a new trial. *Puget Sound Nav. Co. v. Nelson*, 59 F.2d 697 (9th Cir. 1932). A judgment n.o.v. should be granted only if, as a matter of law, there was a total failure or lack of proof on any essential element of a party's case. *Moist Cold Refrigerator Co. v. Lou Johnson Co.*, 249 F.2d 246 (9th Cir. 1957), *cert. denied*, 356 U.S. 968 (1958). The court of appeals' decision to remand for a new trial is consistent with these principles and with the decision of the Seventh Circuit in another post-*Payne* case where, as here, damages had been measured under the *Fowler* rule. *See Vanco Beverages, Inc. v. Falls City Indus., Inc.*, 654 F.2d 1224, 1231 (7th Cir. 1981).

Payne Is Not Dispositive

In *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), this Court held that injury within the meaning of Section 4 of the Clayton Act may not be proven merely by proof of an unlawful price discrimination. To that extent, the Court's opinion clearly overturned the *Fowler* rule. The Court in *Payne* did not decide, however, whether the amount of the price discrimination could properly be the measure of damages in such a case. The Court noted, however, that the plaintiff in *Payne* had made an extremely weak showing of injury, and that it would be a close question whether, in that circumstance, the evidence would be sufficient to support a jury award under relaxed damages rule applicable in antitrust cases.

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5. *Brown v. United States*, 338 F.2d 543 (D.C. Cir. 1964); *Bates v. Dickinson*, 226 F. Supp. 983 (N.D. Calif. 1964); *Todd Seattle Dry Docks v. O'Leary*, 87 F. Supp. 907 (W.D. Wash. 1949).

This case is far removed from *Payne* in the strength of the showing of injury. The plaintiff in *Payne* did not even present evidence showing that the plaintiff's competitors had in fact passed on their lower price to their customers, which the Court suggested may be the *sine qua non* of antitrust injury. 68 L. Ed. 2d 449, 449 n.6. Here, on the other hand, there is abundant evidence that the favored buyers passed on the price discount to their customers. Further, in *Payne* the record was not even sufficient for the Court to determine whether there had been a sufficient showing of a violation. 68 L. Ed. 2d 451-52. The Court therefore remanded to the court of appeals for a determination of liability, which was viewed as a prerequisite to the application of liberalized rules for proof of damages in situations where a wrongdoer's conduct has made damages difficult to measure. Here even the district court held there was sufficient evidence to prove that Texaco had consistently violated the Act. *Payne* does not require review of the court of appeals' disposition of this case.[6]

The Pending Writ of Certiorari In *Vanco Beverages* Is Irrevelant

Texaco argues that the Court should accept its petition because the Court has accepted a petition for a writ of certiorari in *Falls City Indus., Inc. v. Vanco Beverages, Inc.*, 654 F.2d 1224 (7th Cir. 1981), *cert. granted*, 102 S. Ct. 1610 (March 1, 1982) (No. 81-1271). Texaco suggests that the Court is going to review, in the *Vanco Beverage* case, the issue of

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6. On remand, the court of appeals found that Payne's evidence was legally insufficient to support a finding of unlawful price discrimination. The court found that the average difference in bonus payments over the relevant period had amounted to only $11.00 on the price of a new automobile. The court held that this was not the evidence of substantial price differences in a highly competitive market with low profit margins required by this Court's holding in *FTC v. Morton Salt Co.*, 334 U.S. 337 (1948). *Chrysler Credit Corp. v. J. Truett Payne Co., Inc.*, _____ F.2d _____, 1982-1 CCH Trade Cases ¶ 64, 615, at p. 73, 376-377 (5th Cir. 1982). Here, as noted, the district court held that plaintiffs' proof of liability was sufficient to support the verdict. Moreover, there is abundant evidence in this record that the price discrimination was very substantial and caused injury to the plaintiffs.

adequate proof of competitive injury for purposes of a private Robinson-Patman action, and that "this case should be held pending resolution of that case."

Texaco misstates the issue presented by the *Vanco Beverage* case. In that case the evidence allegedly showed that the plaintiff had lost sales because the defendant was a dying regional brewer which had lost sales in all of its markets. The question for review, as phrased by the petitioner, is:

> 2. Whether the Court of Appeals erred in applying the competitive injury test of *FTC v. Morton Salt Co.*, 334 U.S. 337 (1948), where there was no evidence either of seller predation or of systematic preference to large buyers, and where the evidence showed that the plaintiff lost sales because the defendant supplier was a dying regional brewer that lost sales in all of its markets?

This case presents nothing like the same issue. Here there was clear evidence of a systematic preference to large buyers. Further, the other elements outlined by this Court in its *Morton Salt* opinion, are clearly present. The record undeniably shows a long standing, systematic practice of substantial price discrimination, which was used by the favored buyers against the plaintiffs, in an industry characterized by vigorous competition and low profit margins. The pendency of the *Vanco Beverage* petition provides no reason for further review of this case.

CONCLUSION

For the reasons stated herein, it is respectively submitted that Texaco's petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

EXCERPTS FROM PLAINTIFFS' BRIEF IN COURT OF APPEALS

B. GENERAL FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW.

Texaco charged the plaintiffs a "retailer tankwagon" ("RTW) price for their gasoline (Tr., pp. 232, 669, 943, 1075, 1193-94, 1301, 1361, 1480, 1608). It gave Dompier and Gull substantial discounts off the RTW price (Tr., pp. 232, 362-67, 3848-49; Exhibits 463, 464, 79, 378-82) because they bought under "distributor" contracts. (Exhibits 80-83, 71, 79.)

But despite their "distributor" label, Dompier and Gull functioned as retailers, operating retail stations which sold gasoline to the public in the same market as the plaintiffs (Tr., pp. 332-563), but at much lower prices. (Tr., pp. 558, 3867.)[4/] At times Dompier did function

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[4/] See also Tr., pp. 175-77, 180-81, 250, 612-13, 695, 957-58, 963-66, 1097-98, 1204-06, 1213-14, 1311, 1494, 1376, 1612-13, 1737, 2199-200, 2241-42, 2375.

as a wholesaler, but when it did it usually passed along most or all of its discount to the retail stations it supplied, selling to them at prices well below the prices the plaintiffs paid. (Tr., pp. 446, 452-56, 459-61; Exhibits 729, 800, 791.)

Texaco gave Dompier, a "branded" distributor, a discount of 3.65¢-3.95¢ per gallon prior to 1977, and 2.65¢ thereafter.)Tr., pp. 363-68; Exhibits 80-83, 791.) Texaco also paid Dompier a "hauling allowance" which ranged from a low of .446¢ to a high of .809¢ per gallon and which compensated Dompier for the cost of picking up gasoline at the pipeline terminal and delivering it to its stations. (Exhibit 463.) Aside from this delivery function, for which it was compensated, when operating retail stations Dompier performed no functions which the plaintiffs

did not also perform. (Tr., pp. 531-36, 538-39, 554, 1156-60, 3871, 2300.)[5/]

In the early 1970's, and with increasing frequency thereafter, some Texaco wholesalers such as Dompier began to abandon the wholesale function and to operate retail stations, utilizing their price discounts and hauling allowances to post lower retail prices. (Tr., pp. 2297-2321; Exhibit 202, p. 36.)

Dompier began to concentrate most of its sales in high volume retail outlets in the early 1970's. Initially it sold to these outlets at sizeable discounts, but before long it took them over and operated the stations itself. (Tr., pp. 405-460; Exhibits 557, 26.) Retailing became 80%

[5/] The court instructed the jury that they could consider the hauling allowance in determining whether Texaco's discount to Dompier was an unlawful price discrimination or a functional discount as Texaco contended. (Tr., p. 4265.)

of its business. (Tr., p. 466.) By the end of 1978, Dompier was operating six Texaco retail stations, and supplied two others which were owned through a related corporation, Red Carpet Service, Inc., which had the same address as Dompier and common officers and directors.[6/] (Tr., pp. 349-58, 1881-87.) All the Dompier stations were "Texaco" stations. They sold the same product, displayed the Texaco sign and colors, and honored the Texaco credit card. (Tr., pp. 468-69, 554, 1884, 2445.)

Gull, an "unbranded" distributor, owned a chain of retail stations which marketed under the "Gull" brand. (Tr., p. 577.) Gull resold most of its gasoline

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[6/] Until 1973, John K. Dompier wholly owned John Dompier Oil Company and Red Carpet Service, Inc. Then John Dompier retired and his son Neil began purchasing his interest in Dompier Oil Company on a long-term contract. John Dompier and his wife Marjorie remained as officers and directors of both corporations. (Tr., pp. 349-58, 420-21, 1881-87, 1973.)

through "commission" stations (Tr., pp. 571-72),[7] but prior to 1975 Gull also sold to "consignment" or "open account" dealers who marketed under the "Gull" brand.[8] (Tr., p. 577.) Texaco's price discounts to Gull ranged from 4¢ to 6¢. (Exhibits 79, 378-82, 645, 648-56, 463-64.)

C. EVIDENCE OF DAMAGE CAUSALLY RELATED TO PRICE DISCRIMINATION.

The retail gasoline market in Spokane was characterized by strong competition and low profit margins. (Tr., pp. 563, 1207, 1213, 1218-19, 3603-07, 3862, 3867.) Except in the most unusual circumstances, a

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[7] The station operator received a commission for each gallon of gasoline sold through the station. (Tr., pp. 570-71, 598, 617.) Gull set the stations' retail prices, and title passed directly from Gull to the retail purchaser. (Tr., pp. 570-71, 598, 617.) By 1975, all Gull stations were commission stations. (Tr., pp. 571-72.).

[8] Exceptions were Gull's sales to Autotronics Corp., which operated a chain of low-priced stations under the name "Fill 'M Fast". (Tr., pp. 592-93.)

station's retail gasoline price was the most important factor to its success. (Tr., pp. 2303-04, 3824-26, 3836, 3861-62, 3864-66.) According to Texaco's own training manual, the amount of a station's nongasoline sales (such as sales of tires, batteries and accessories (TBA)) depended upon the size of its gasoline sales. (Tr., pp. 677-82; Exhibit 201.)[9/]

The plaintiffs' Texaco stations were, with one exception, all located in the central or northern part of the city,[10/] on or near major traffic arterials. The Dompier and Gull stations were for the most part located in the same central/north city

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[9/] See also Tr., pp. 183, 257, 1214-15, 1314, 1609, 1740-41, 2232-33.)

[10/] Appendix A. The only exception was the station of Clifford Robinson. His station was located on Interstate 90 on its western approach to the city.

area, on or near the same arterials.[11/] (Appendix A, B, C.) Because of Spokane's relatively small geographic size and the pattern of its streets, the city has substantial cross-city traffic and there was effective competition among stations over relatively broad areas. (Tr., pp. 609-613.) A vice-president of Gull testified that gasoline prices tended to move city-wide, attributing that fact to the high degree of mobility of Spokane motorists. (Tr., pp. 609-10.) This view was shared by the district sales manager for a chain of independent stations, who observed that price changes in one part of Spokane moved and affected other parts of the city,

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[11/] The locations of the various stations are identified on the map which appears in Appendix A. Their precise street addresses are set forth in Appendix B and the facts relating to the competition between the plaintiffs' stations and the Dompier and Gull stations are summarized in Appendix C.

and that price was extremely important to competition. (Tr., pp. 3600, 3603-07.)

Texaco made price changes on a city-wide basis, having abandoned in 1973 the practice of setting its prices on the basis of "zones" of competition within the city. (Tr., pp. 3835-37.) Moreover, even while they were used, Texaco's representatives believed that the price zones were too small (Tr., pp. 2393, 3831, 3846-48), a view shared by Gull (Tr., pp. 600-610), and Texaco included many of the plaintiffs' stations in or adjacent to zones in which Dompier and Gull stations were located. (Tr., pp. 542-47, 1058, 1062, 1068-69, 1096, 1370-71, 1741-42.)

Texaco encouraged Dompier to expand into this retail market. It had a "Fill the Gap" program under which distributors were "encouraged and motivated . . . to select and develop prime sites, thereby improving retail representation . . . ."

(Exhibit 11, p. 1.) Texaco's Wholesale Manager set an objective of three new distributor stations for the Spokane District under this program (Exhibit 12), and Texaco's Spokane representatives encouraged Dompier to purchase stations even if he had to pay more than their actual value to obtain them. (Tr., pp. 470-71, 1161-66, 1176-78, 1183-85, 1889-90.)

Dompier began by selling gasoline at substantial price discounts to low price, high volume Texaco stations.12/ Soon, however, it began to take over those stations, thereafter operating them

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12/In 1972 and 1973, Dompier sold at prices 2.65¢-3.4¢ below the RTW price to stations on Market Street, Third Avenue, Monroe Street, and Division & Cataldo, and to the two Red Carpet stations (one located on North Division Street, the other on Sprague Avenue, both principal traffic arteries). (Tr., pp. 444-62; Exhibits 791, 788, 789, 792, 800, 804.) Dompier continued selling at discounts below the RTW price until approximately January, 1974. (Id.; Tr., pp. 1837-39.)

directly. Dompier acquired a large Texaco station on Third Avenue, in the heart of Spokane, in mid-1974 (Tr., pp. 421-23), stations on Monroe Street and Freya Street, each a major north-south arterial, in 1975 (Tr., pp. 427-30), stations at Mission and Magnolia (at the intersection of two major arterials) and at Airway Heights in 1977 (Tr., pp. 433-36), and a station on Market Street, a major north-south arterial, in 1978. (Tr., pp. 430-31; Exhibits 800, 788, 789.) In addition, Dompier continued to supply the two Red Carpet stations.[13]/

The Gull stations, like Dompier's, were located on main traffic arterials, often very close to the plaintiffs' stations, and were exposed to the same customer traffic. (Appendix A, B, C.) Gull

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[13]/The Red Carpet stations were "car wash" stations which provided car washes to customers who purchased gasoline. (Tr., p. 964.)

operated eight stations in Spokane by 1975. (Exhibit 385.)

The Dompier stations generally posted retail prices 2-10¢ lower than the plaintiffs and 1¢ above the "independent" stations. (Tr., p. 558; see footnote 4, supra.) Often they charged retail prices which were at or near the wholesale price which the plaintiff had to pay Texaco. (Tr., pp. 1097-98, 1204-06, 1213-14, 1097-98, 1737, 2241; Exhibit 558.) A Gull executive characterized the Dompier stations as aggressive retail marketers which priced below their competitors in the immediate area and below prevailing major brand prices. (Tr., pp. 612-13.) Gull stations also priced much lower than the plaintiffs. (Tr., pp. 180-81, 957-58, 1376, 3867.)

Each plaintiff testified about how his station competed with the Dompier and Gull stations. (Appendix C.) Although it was

impossible to prove where former or potential customers of the plaintiffs bought their gasoline, several witnesses were able to identify specific custormers lost to Dompier and Gull because they observed the customers in the other stations (Tr., pp. 177, 178, 2242, 695-96, 702, 717; Appendix C) or because they saw credit card invoices from the Dompier or Gull stations in customers' automobiles when servicing them. (Tr., pp. 1741, 2242; Appendix C.)

The plaintiffs responded to the competition in a variety of ways. Some recognized that without the same buying price they could not post a low enough retail price to compete effectively on a price basis, and kept their retail prices high in an effort to earn the maximum profit on each gallon sold. (Appendix C.) Others converted their stations in whole or in part to self-service operations and matched the Dompier and Gull prices, but

lost money in doing so because of their higher buying price. (Id.) Others reduced their prices as much as possible, but not so far as to operate at a loss. These dealers found that their lower retail price was not low enough to substantially increase their gallonage. (Id.) Another plaintiff tried to offer hand car washes or car wash tickets to compete with a Dompier-owned Red Carpet car wash station one block away, but had insufficient profit margins to do so. (Tr., pp. 971-76.) All of the plaintiffs, recognizing they were unable to compete effectively on price, tried other means to compete. They worked extremely long hours, gave extremely good service, and invested in other inducements to attract customers (e.g., truck rental services, ice machines, etc.). (Appendix C.)

Texaco knew that dealers like the plaintiffs were in a disadvantageous

position. In a marketing department report discussing distributors who were retailing, Texaco concluded that independent retailers who converted to self-service but who paid the RTW price could be competitive only to a degree, and that retailers with a partial self-serve operation could not be sufficiently competitive to maintain sales in the long term. (Exhibit 202, p. 36.)

The results of this competitive situation were startling. Between 1970 and 1978, Dompier's sales increased by more than 5,000,000 gallons. (Tr., p. 3885.) Between 1970 and 1975, Dompier's monthly sales volume almost tripled (from 155,152 gallons to 462,956 gallons), whereas during the same period of time monthly "throughput" gallonage (gallonage sold to independent Texaco dealers such as the plaintiffs) fell from 569,269 gallons to 389,557. (Exhibit 215.) Whereas Dompier accounted for only 20.7% of the Spokane District

retail marketing volume in 1970 (155,152 gallons per month out of 749,786 gallons per month total), only four years later its share had grown to almost 50% (462,956 gallons per month out of 928,664 total gallons). (Exhibit 215, p.2.) During the same period of time, the share of the directly-supplied retailers like the plaintiffs declined from 76% to 42% (Exhibit 215, p.2), and the plaintiffs' sales either declined or showed little or no growth. (Exhibits 709, 712-721, 645, 648-657.) Eight Dompier stations were outselling 19 independent dealers. (Tr., p. 2178.) From 1975 to 1978, Dompier's annual sales increased an additional 1,200,000 gallons. (Tr., pp. 3881-85.) By 1978 seven of the thirteen plaintiff stations had closed. (Appendix C.)

Similar growth occurred with the Gull stations. Between 1973 and 1976, Gull's retail volume through its five major retail

outlets increased from 2,476,213 gallons to 4,629,620 gallons, or a growth rate of 87% over three years.[14/]

Numerous witnesses and exhibits supported the conclusion that these effects were causally related to the price discrimination favoring Dompier and Gull. Several witnesses, including the president of Dompier and Texaco's assistant district manager for the Spokane District, testified that a competitor with a lower buying price necessarily had a competitive advantage in the Spokane market over another competitor paying a higher price (Tr., pp. 563, 2386, 3862-63, 3867, 3869, 3606-07, 3825-26, 2303), and that price differences of one or two cents could cause substantial shifts in gallonage sold. (Tr., pp. 3603-04.) According to the area manager, a dealer

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14/ Exhibits 762, 763, 764, 767, 769. These are the years and stations for which complete Gull volume data was available.

paying a higher price than another was unable to match the retail price of the favored purchaser. (Tr., p. 3862.) The district manager for an independent chain of stations testified that a retail price difference of 2¢ would have a substantial effect on the amount of gasoline a station sold; that there is a definite relationship between a station's buying price and the retail price it can charge; and that a station with a lower buying price has more flexibility to post a competitive retail price. (Tr., pp. 3603-07.)

Texaco's own vice president in charge of marketing acknowledged that a distributor who operates as a retailer departs from his traditional role (Tr., pp. 2298-2300), and that by virtue of their discount distributor retail stations could charge substantially lower prices than independent

Texaco dealers (Tr., pp. 2303-04, 2327-31.) He testified, further, that this had caused "rampant and alarming" increases in distributor sales and dramatic shifts in volume away from independent retailers (Tr., pp. 2301-2321), and that "a great portion" of the independent retailers' loss could be explained by the magnitude of the distributor discount and the hauling allowance (Tr., pp. 2309-10). Most significantly, he testified that it was the judgment of Texaco management that the lower distributor price was the "root cause" of the problem:

> Q Was it then at that time the judgment of Texaco that the root cause of this problem was the distributor price?
>
> A Well, I wouldn't say the word "Texaco," of the sales, of the sales marketing, you know, management people, yes, that's what it came down to, right.

(Tr., p. 2321.)

In another internal document Texaco admitted that retailers who paid the RTW price had a "very real problem" in competing against distributor retailers. (Exhibit 202, p. 36.) It concluded that independent retailers who continued to post prices reflecting their traditional profit margins lost sales, but that if they went to partial or full self-serve operation they could only be competitive to a degree because of their higher buying price. (Id. at p. 36-37.)

Texaco drew the identical conclusion about the effects of its price discrimination in Spokane. A Texaco sales representative, asked to evaluate an effort by Dompier to obtain the Mission & Magnolia station, concluded that Dompier was being given a marketing advantage over independent retailers "with which they cannot compete":

> In addition, Dompier would achieve a net increase of one unit to nine accounts, eight of which are owned by the Distributor and operated on self-serve basis, pricing generally $.05 to $.10 below full service investment units in Spokane and with a technical cost/RTW spread of $.0365 per gallon. This would categorically allow our Distributor a retail marketing advantage over our present contract retailer and investment retailers with which they cannot compete.

(Exhibit 215, p. 3, emphasis added.)

Another Texaco sales representative who was assigned to the plaintiffs' stations testified that the plaintiffs were directly affected by the distributor stations and that their ability to compete with the distributor stations was a key to their marketing strategy. (Tr., pp. 2368-2375.) In fact, he testified that Texaco's Spokane management referred to Texaco's pricing in Spokane as a "two-headed snake" and that the Texaco management believed that Texaco would have to decide on one method or the other because

the two were in conflict. (Tr., pp. 2378-82.) The plaintiffs' sales representative also testified that the plaintiffs would have been unable profitably to operate their stations as low price, self-service stations while paying the RTW price. (Tr., pp. 2392-93.) Another Texaco sales representative acknowledged that there is a "direct relationship" between a dealer's buying price and the retail price he can charge, and another admitted to one of the plaintiffs that a distributor station was the direct cause of the plaintiff's marketing problems. (Tr., pp. 2250-53.)

D. PLAINTIFFS' PROOF OF DAMAGES.

Plaintiffs sought to recover the amount of the price discrimination on the gasoline they purchased. That is the measure of damages approved by this Court in Fowler Mfg. Co. v. Gorlick, 415 F. 2d 1248 (9th Cir. 1969), cert. denied, 396

U.S. 1012 (1970). The jury's verdict represents an average award of $10,891 per year for each plaintiff.[15/]

The damages sought were limited in scope. Plaintiffs sought damages only for gallons of gasoline actually purchased; they sought no damages for additional gallons they would have sold but which they lost; no damages for lost sales of TBA or mechanical services, and no damages for loss in going concern value of their businesses, or lost investment, although

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15/ The 12 plaintiffs had 13 stations which were operated for a total of 78 station years (number of stations X number of years stations operated). The verdict of $849,494, divided by 78 station years, results in an average award of $10,891 per year for each of plaintiffs' stations.

they were substantial. (Tr., pp. 2012-2038; Exhibits 526, 801.) Further, plaintiffs requested damages only during the time when an actionable discrimination existed. No damages were sought or awarded for the short periods of time when there was no discrimination. (Tr., pp. 3921, 2012-38, 4162; Exhibits 804, 800, 526.)

AFFIDAVIT OF SERVICE & FILING

Pursuant to Rule 28.2, Rules of the United States Supreme Court, the undersigned, a member of the Bar of the Court, states that Respondents' Brief in Opposition to Petition for Writ of Certiorari was deposited, properly addressed to the Clerk of the Court, in a United States post office or mail box, with first-class postage prepaid, on June 18, 1982; and that on said date copies of said brief were served on the following counsel for Petitioner as required by the Rules of this Court:

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The undersigned further states that counsel for Respondents received a copy of the Petition for Writ of Certiorari on May 20, 1982.

s/ William L. Dwyer

William L. Dwyer

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

On this 18th day of June, 1982, before me, a Notary Public in and for the State of Washington, personally appeared William L. Dwyer, to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

SUBSCRIBED AND SWORN to before me this 18th day of June, 1982.

s/ John S. Ebel

John S. Ebel
Notary Public in and for the State of Washington, residing at Seattle